90-1673

Supreme Court, U.S.
FILED
APR 12 1991
OFFICE OF THE CLERK

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

COLUMBIA OLDSMOBILE, INC.,

Petitioner,

vs.

CITY OF MONTGOMERY, OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Robert E. Manley
[Counsel of Record]
Timothy A. Fischer
Attorney for Petitioner
Manley, Burke & Fischer
225 West Court Street
Cincinnati, Ohio 45202
Telephone: (513) 721-5525

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

I. QUESTION PRESENTED FOR REVIEW

WHETHER A MUNICIPAL CORPORATION THAT ADOPTS A POLICY THAT ZONING DECISIONS BE MADE IN ACCORDANCE WITH A COMPREHENSIVE PLAN BUT DOES NOT UTILIZE A COMPREHENSIVE PLAN IN DENYING A LANDOWNER'S APPLICATION FOR A ZONE CHANGE VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

TABLE OF CONTENTS

Page

I. **QUESTION PRESENTED FOR REVIEW**

WHETHER A MUNICIPAL CORPORATION THAT ADOPTS A POLICY THAT ZONING DECISIONS BE MADE IN ACCORDANCE WITH A COMPREHENSIVE PLAN BUT DOES NOT UTILIZE A COMPREHENSIVE PLAN IN DENYING A LANDOWNER'S APPLICATION FOR A ZONE CHNAGE VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. 1

II. **STATEMENT OF THE CASE** 1

A. **Procedural Posture** 1

B. **Statement of Facts** 2

III. **ARGUMENT** 7

QUESTION PRESENTED FOR REVIEW

WHETHER A MUNICIPAL CORPORATION THAT ADOPTS A POLICY THAT ZONING DECISIONS BE MADE IN ACCORDANCE WITH A COMPREHENSIVE PLAN BUT DOES NOT UTILIZE A COMPREHENSIVE PLAN IN DENYING A LANDOWNER'S APPLICATION FOR A ZONE CHNAGE VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. 7

Authorities

Nollan v. *California Coastal Commission*, 483 U.S. 825, 834 (1987) 7

Page

Cincinnati, H&C R. Co. v. *Cincinnati*, 71 F.2d 124 cert. den. 293 U.S. 612 8

State v. *Toledo*, 142 Ohio St. 123, 50 N.E.2d 338 8

City of St. Louis v. *Western Union Tel. Co.*, 149 U.S. 465 8

Baker v. *City of Milwaukee*, 271 Ore. 500, 533 P.2d 772 (1975) 8

O'Loane v. *O'Rourke*, 231 Cal.App.2d 774, 42 Cal.Rptr. 283 (2d Dist. 1965) 10

68 Harv.L.Rev. 1154, 1175 (1955) 10

APPENDIX:

Decison of the Supreme Court of Ohio, Dated December 12, 1990 ..... 1a

Decision of the Court of Appeals of the First District of Ohio, Hamilton County, Ohio, Dated May 10, 1989 ..... 14a

Judgment Entry of the Court of Common Pleas, Hamilton County, Ohio 26a

Findings of Fact and Conclusions of Law of the Court of Common Pleas, Hamilton County, Ohio .. 29a

TABLE OF AUTHORITIES

	Page
Baker v. *City of Milwaukee*, 271 Ore. 500, 533 P.2d 772 (1975)	8
Cincinnati, H&C R. Co. v. *Cincinnati*, 71 F.2d 124 cert. den. 293 U.S. 612	8
City of St. Louis v. *Western Union Tel. Co.*, 149 U.S. 465	8
Nollan v. *California Coastal Commission*, 483 U.S. 825, 834 (1987)	7
O'Loane v. *O'Rourke*, 231 Cal.App.2d 774, 42 Cal.Rptr. 283 (2d Dist. 1965)	10
State v. *Toledo*, 142 Ohio St. 123, 50 N.E.2d 338	8
68 Harv.L.Rev. 1154, 1175 (1955)	10

JURISDICTION OF THIS COURT

This is an appeal from an order of the Ohio Supreme Court denying rehearing of a judgment and opinion issued in the litigation below. The jurisdiction of this court is based upon 28 U.S.C. Section 1257. The decision of the Supreme Court of Ohio was issued on December 12, 1990 (Appendix, p. 1a); the Motion of Petitioner herein for rehearing was denied by the Ohio Supreme Court on January 16, 1991 (Appendix, p. 35a).

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

COLUMBIA OLDSMOBILE, INC.,

Petitioner,

vs.

CITY OF MONTGOMERY, OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

II. STATEMENT OF THE CASE

A. Procedural Posture.

Petitioner Columbia Oldsmobile, Inc.[1] (hereinafter "Columbia") commenced a declaratory judgment action on June 5, 1986, in the Common Pleas Court of Hamilton County, Ohio, to challenge the constitutionality of the Respondent City of Montgomery's (hereinafter "Montgomery") municipal

[1] Columbia Oldsmobile, Inc. is an Ohio corporation which is wholly owned by Columbia Oldsmobile Co., Inc., which also owns Columbia Motors Acceptance Corp., an Ohio corporation; the petitioner has no subsidiary corporations. Its primary business is selling and servicing automobiles.

zoning regulations as applied to property owned by Columbia. The declaratory judgment action was brought only after Montgomery denied Columbia's application for a zoning change to permit Columbia to develop its 16.6 acre parcel with a 41,000 square foot shopping center.

The case was tried before a Hamilton County Common Pleas Judge, sitting without a jury. The trial began on October 5, 1987, and on October 15, 1987, the Trial Court entered judgment in favor of Montgomery, based upon written Findings of Fact and Conclusions of Law.

On October 26, 1987, Columbia filed a Notice of Appeal to the Court of Appeals for Hamilton County, First Appellate District of Ohio. The case was argued to the Court of Appeals on June 20, 1988, which entered its decision on May 10, 1989, reversing the judgment of the trial court and directing the Court of Common Pleas to enter a judgment for Columbia.

Montgomery filed a Notice of Appeal to the Supreme Court of Ohio on June 9, 1989, which accepted the case for Review. On December, 12, 1990, the Supreme Court of Ohio reversed the judgment of the Court of Appeals and reinstated the judgment of the Court of Common Pleas. Because the decision of the Ohio Supreme Court suggested that the Court of Appeals had, in fact, ruled that a Comprehensive Plan was a prerequisite to rezoning, petitioner sought a rehearing, presenting to the Ohio Supreme Court the federal constitutional issue presented here. The court denied the motion for rehearing, and Columbia now brings this petition to this Court.

B. Statement of Facts.

This case involves 11.5 acres of land owned by Columbia and located within the City of Montgomery, and more particularly involves the constitutionality of the "A" residential zoning restrictions imposed on the property by Montgomery. The 11.5 acres are part of a larger, 16.6 acre tract owned by Columbia, and located generally at the southeast

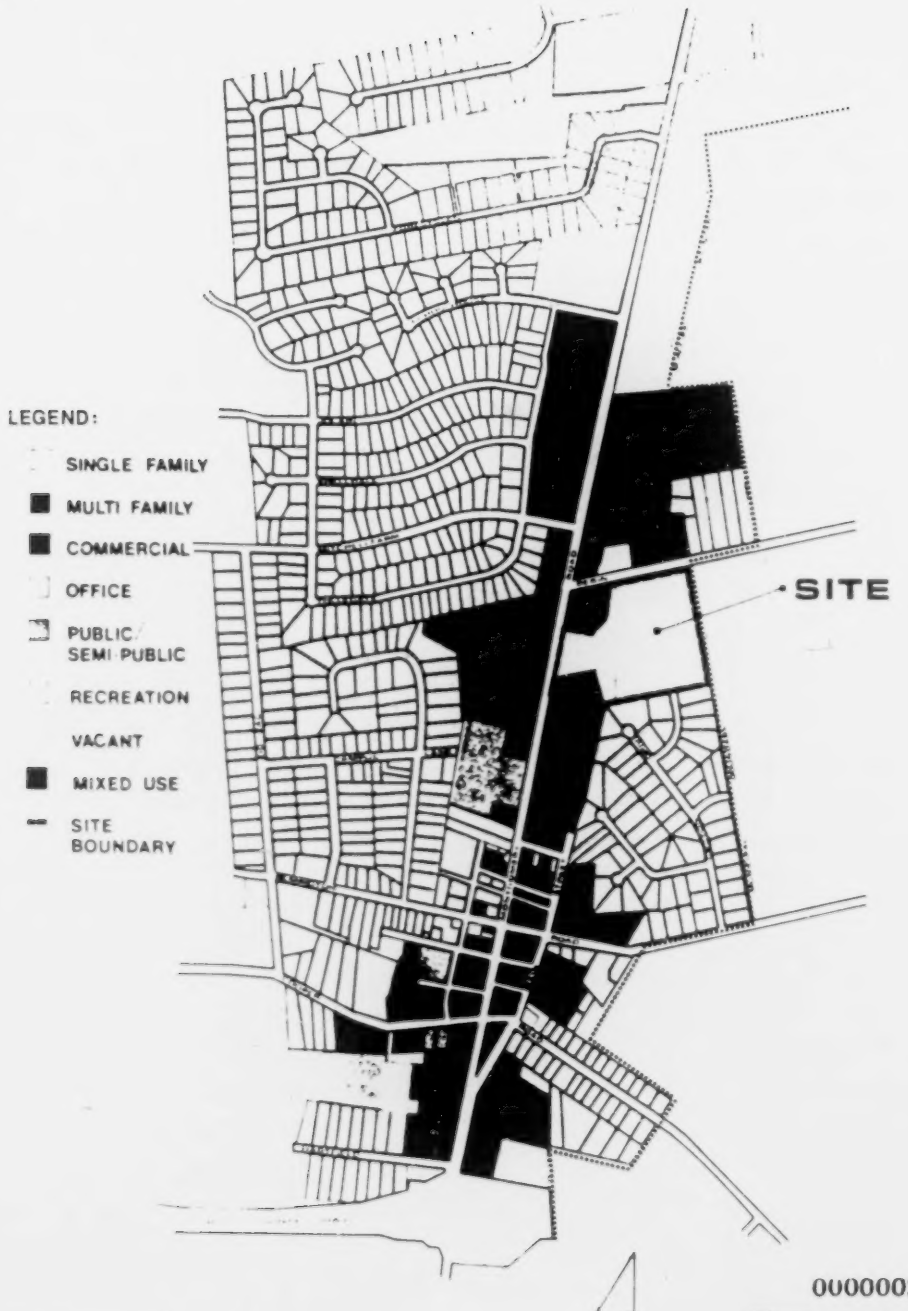
corner of Perin Road and Montgomery Road, a heavily traveled commercial thoroughfare.

Montgomery is a suburban community with a population of approximately 12,000 located 15 miles northeast of Cincinnati. The major north/south thoroughfare in Montgomery is Montgomery Road (State Route 22). Montgomery Road bisects the heart of Montgomery's business district and connects the northeastern Cincinnati suburban communities of Kenwood, Montgomery, Blue Ash and Landen. It is used as an access road to all the major highways in Cincinnati (Interstate 71, Interstate 75, Interstate 275 and Cross-County Highway). Nineteen thousand vehicles travel along Montgomery Road each day. At the Columbia property it is four lanes wide.

The location of Columbia's property and its relation to nearby and adjacent commercial properties is depicted on plaintiff's Exhibit 39, reproduced on the next page for the convenience of the Court.

Columbia's property is classified under two different zoning categories: The 5.1 acres immediately adjacent to Montgomery Road are zoned "E" retail business; the remaining 11.5 acres are zoned "A" residential with a 20,000 square foot minimum lot size requirement. This case pertains only to the 11.5 acres zoned residential.

Columbia's property was used as a drive-in movie theater from 1945 to 1975. The 11.5 acres at issue were not part of Montgomery until they were annexed in 1967. A Montgomery ordinance automatically classifies all annexed land in the "A" residential classification, regardless of the use on its location; this property still retains that automatic "A" zoning. This residential zoning was imposed on Columbia's property without hearing, planning, analysis or debate, and notwithstanding the actual long-standing commercial use of the property.



EXISTING LAND USE

00000030

PLAINTIFF'S EXHIBIT 39

BEST AVAILABLE COPY

After the drive-in theater ceased operations in 1975, the property lay idle until in 1982 Montgomery began leasing it from Columbia for $50.00 per year for use as a materials storage and staging terminal for its highway crews. This heavy industrial use of the subject property continued until 1985 when Columbia refused to renew the lease because of a dispute over Montgomery's failure to maintain the property in a neat and orderly manner.

Columbia's property lies in the middle of the Montgomery business district, a popular regional retail center, usually referred to as the "Montgomery Commercial Corridor."

In the immediate vicinity of the subject property lie commercial establishments of every description, including three separate automobile dealerships, Chester's Road House Restaurant, Chase Bank, Central Trust Bank, Hardee's Restaurant, Frisch's Restaurant, Steak-n-Shake, T-K Garden and Nursery Center and three large multi-tenant shopping centers, Tollgate Square (which touches the subject property), Montgomery Square (across the street and only several hundred feet from the subject property) and The Market Place. These businesses, permitted by Montgomery zoning, extend between 800 and 1,200 feet east and west of Montgomery Road. The subject property lies approximately 800 to 1,200 feet east of Montgomery Road. Columbia's property also enjoys frontage on Perin Road which, as to the portion which Columbia's property fronts, is a commercial street.

For the most part, the predominant nearby land use is business or office. The only exceptions are to the east of Columbia's property, which is vacant land in the Village of Indian Hill, and South of Columbia's property, which was developed as a single-family subdivision, known as Governor's Watch, 30 years ago when the Columbia property was being used as a drive-in theater. Governor's Watch is separated and hidden from Columbia's property by a natural tree line and located 10 to 16 feet below the grade of Colum-

bia's property. Only three lots abut Columbia's property at this lower elevation.

To the west of the property, all the zoning and uses are "E" retail. North of the subject property, the zoning is a combination of Retail "E," "PD" planned development district and residence "A"; however, the only use of these properties is retail business. All of the "E" zone is used for business; the "PD" area, rezoned from Residence "A" in 1982 to accommodate a small condominium project which was never built, is the site of a boarded-up house; and the residence "A" zone directly across Perin Road is occupied by the T-K Garden Center, a thriving nonconforming commercial/retail operation.

From 1962 until the present, with the sole exception of this parcel, Montgomery has actively fostered the expansion of commercial activity in existing commercial retail zones.

Although neither the Court of Appeals nor the Ohio Supreme Court held that Montgomery was required to have such a plan, the Court of Appeals found that Montgomery did not have the comprehensive plan which it obligated itself to have. However, Montgomery's comprehensive need for a plan must be measured against the requirements it imposed upon itself under its home rule power and the impact upon Columbia when Montgomery chose to ignore that requirement.

III. ARGUMENT

QUESTION PRESENTED FOR REVIEW

WHETHER A MUNICIPAL CORPORATION THAT ADOPTS A POLICY THAT ZONING DECISIONS BE MADE IN ACCORDANCE WITH A COMPREHENSIVE PLAN BUT DOES NOT UTILIZE A COMPREHENSIVE PLAN IN DENYING A LANDOWNER'S APPLICATION FOR A ZONE CHANGE VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Supreme Court of Ohio did not hold that a comprehensive plan is a condition precedent to a valid zoning ordinance. Montgomery did, however, obligate itself to create one. In so doing, the City of Montgomery announced to citizens and property owners Montgomery's "standards for determining what constitutes a 'legitimate state [municipal] interest.' " From the comprehensive master plan that Montgomery chose to require of itself, property owners and others could determine "what type of connection between the regulation and the state [municipal] interest satisfies the requirement that the former 'substantially advanced' the latter. * * *" *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 834 (1987).

Both the Court of Appeals and the Ohio Supreme Court found that no such comprehensive plan had been enacted. The Court of Appeals found:

> "[t]hat the ordinance setting forth the city's zoning goals and policies, enacted just prior to the filing of Columbia's complaint for declaratory judment, does not rise to the level of a comprehensive zoning ordinance. The trial court erred in finding the existence of a comprehensive plan."

(Court of Appeals Decision at p. 9, Appendix p. 20a.) Based on this finding, among others, the Court of Appeals held the

Montgomery zoning ordinance unconstitutional insofar as it applies to Columbia's property. The Court of Appeals clearly did not hold, even "implicitly," as the Ohio Supreme Court suggests, (Appendix p. 10a) that a municipality is required to have a comprehensive community plan.

Montgomery is an Ohio municipality possessed of constitutional "Home Rule Power," (Art. XVIII, §§ 3, 7, Ohio Constitution) a self-executing power requiring no further implementation by the Ohio General Assembly. *Cincinnati, H&C R. Co.* v. *Cincinnati*, 71 F.2d 124 cert. den. 293 U.S. 612; *State* v. *Toledo*, 142 Ohio St. 123, 50 N.E.2d 338. Such Home Rule Power gives Montgomery power to enact its own laws; it is the concept of *imperium in imperio*," as set out by Mr. Justice Brewer in *City of St. Louis* v. *Western Union Tel. Co.*, 149 U.S. 465, subject to certain state-reserved authority not relevant here.

But once the City of Montgomery obligated itself to base future zoning decisions upon such a master plan, Montgomery was obligated, by its own ordinance, to do so. The City made a compact with its citizens which it did not keep. This issue is one of first impression. Prior decisions, however, shed light upon the importance of the comprehensive plan to subsequent zoning decisions.

The case of *Baker* v. *City of Milwaukee*, 271 Ore. 500, 533 P.2d 772 (1975), originated as an appeal from the dismissal of a writ of mandamus. Baker sought to compel the City to conform a zoning ordinance to its comprehensive plan and thereby cancel a variance issued by the Planning Commission, and to suspend the issuance of building permits in areas of the city where the zoning ordinance allows a more intensive use than set forth in the comprehensive plan. In this case, the zoning ordinance was passed in 1968 (which allowed development of the subject property at 39 units per acre) and the City Council adopted the comprehensive plan in 1970 (which allowed development at only 17 units per acre).

The Oregon Supreme Court granted review "to consider

the effect of the adoption, by a municipality, of a comprehensive plan on preexisting and conflicting zoning ordinances."

The City argued that, although it had passed a comprehensive plan, it had no duty to effectuate it through the enactment of conforming zoning ordinances, and further suggested that the present conflicting zoning ordinances could remain in effect until the City decides to replace them with ordinances in accord with the comprehensive plan. In rejecting this position, the Oregon Supreme Court stated that the City's position evidenced a fundamental misunderstanding of the relationship between planning and zoning.

The Court ruled that once a comprehensive plan is in place, it must be relied on in zoning decisions. Even if there is no duty to adopt a comprehensive plan, once the City does adopt a comprehensive plan, it must follow it. The court went on to say that:

> "If that plan is to have any efficacy as the basic planning tool for the City of Milwaukee, it must be given preference over conflicting prior zoning ordinances. To hold otherwise would allow a city to go through the motions and expense of formulating a comprehensive plan and then relegating that document to oblivion through continued reliance on the older zoning ordinance. . . .[T]he City of Milwaukee, upon adopting a comprehensive plan, had a duty to implement that plan through the enactment of zoning ordinances in accordance therewith."

In summary, the court said that:

> "we conclude that a comprehensive plan is the controlling land use planning instrument for a city. Upon passage of a comprehensive plan a city assumes a responsibility to effectuate that plan and conform prior conflicting zoning ordinances to it. We further hold that the zoning decisions of a city must be in accord with that plan and a zoning ordinance which

allows a more intensive use than that prescribed in the plan must fail."

A similar result was reached in *O'Loane* v. *O'Rourke*, 231 Cal.App.2d 774, 42 Cal.Rptr. 283 (2d Dist. 1965). This case originated from a judgment in a mandamus action that required the City Council of the City of Commerce to either repeal a resolution which adopted a "general plan" or submit the resolution to a vote of the electors.

The City argued that the adoption of the general plan cannot be subject to referendum because the general plan is not a zoning ordinance, has no legislative effect, and its adoption is an administrative and executive act, not a legislative one. As in Ohio, the operation of the state's Planning Act is optional or permissive. As the court noted, "the legislature has not made the formulation of a general plan a precondition to the exercise of zoning control."

The Court quotes Professor Haar's Harvard *Law Review* article, "In Accordance With A Comprehensive Plan," 68 Harv.L.Rev. 1154, 1175 (1955), in saying that if the master plan is to have ". . . a directly controlling influence on zoning regulation, it would appear necessary to have it legislatively adopted, rather than merely stated by the planning authorities and functioning as an interesting study without much direct relevance to day-to-day activity."

In the *O'Loane* case, the court found that:

"[t]he general plan in this instance very definitely has a direct effect upon all of the property in the city and upon its future development. The plan sets out that it is to become 'the framework within which specific planning can be undetaken' and to be the 'basis for the preparation of precise plans.' . . . The general plan also sets forth that 'after adoption of the General Plan, any subsequent determination made by the Planning Commission should first be reviewed as to its conformity with the General Plan' and the council is author-

> ized 'to adopt and use the General Plan as a guide for orderly community growth and development. . .' and further that 'the General Plan should be referred to as a guide in making decisions that affect the elements of the General Plan.' "

The court goes on to say that:

> "it is apparent that the plan is, in short, a constitution for all future development within the city. No mechanical reading of the plan itself is sufficient. To argue that property rights are not affected by the general plan as adopted ignores that which is obvious. Any zoninig ordinance adopted in the future would surely be interpreted in part by its fidelity to the general plan as well and by the standards of due process."

In 1982, the Montgomery City Council adopted Resolution No. 35-1982 and directed "the City Manager *to undertake the preparation* of a Comprehensive Plan for the City of Montgomery that will identify the City's major needs and desirable improvements." Yet, three years later, when the City denied Columbia's application for rezoning, the City still had not adopted such a plan to govern desirable improvements. In fact, it had done almost nothing to prepare the Comprehensive Plan, other than agree on a few Guidelines and Objectives, and publish the results of a "Community Survey," all done in 1983.

Quite clearly, the zoning of Columbia's property was not the result of careful or comprehensive planning. The "plans and studies" posited by Montgomery as a comprehensive plan are grossly inadequate as a justification for a planning or zoning decision and were, in fact, prepared and adopted in anticipation as a result of the litigation with Columbia. Land use expert witnesses called by both parties agreed that these documents did not constitute a comprehensive plan. Thus, the basis to determine whether or not the municipal action substantially advanced municipal interests is absent.

The Court of Appeals correctly concluded that there was no comprehensive plan underlying the Montgomery zoning ordinance, and the absence of such a plan, given Montgomery's commitment to enact and follow such a plan, deprives Petitioner of property rights guaranteed under the United States Constitution. For these reasons, the writ sought herein should be granted.

Robert E. Manley

Timothy A. Fischer

Attorneys for Petitioner
Manley, Burke & Fischer
225 West Court Street
Cincinnati, Ohio 45202
Telephone: (513) 721-5525

OF COUNSEL

Manley, Burke & Fischer
225 West Court Street
Cincinnati, Ohio 45202

APPENDIX

COLUMBIA OLDSMOBILE, INC., APPELLEE, *v.*
CITY OF MONTGOMERY, APPELLANT.

[Cite as Columbia Oldsmobile, Inc. *v.* Montgomery (1990), 56 Ohio St. 3d 60.]

Municipal corporations—Zoning—Trial court must uphold municipal zoning ordinance when there is competent, credible evidence that the ordinance allows landowners to retain an economically viable use of their land and substantially advances a legitimate governmental interest in the health, safety or welfare of the community.

(No. 89-1132—Submitted September 25, 1990—Decided December 12, 1990.)

APPEAL from the Court of Appeals for Hamilton County, No. C-870741.

In 1967, the city of Montgomery annexed an 11.5-acre parcel of land that borders Perin Road to the north, the village of Indian Hill to the east, Governor's Watch, a residential development, to the south, and commercial land bordering Montgomery Road to the west. When it was annexed, this property was the site for a drive-in theater. The annexed site was automatically zoned in the "A" residential classification, pursuant to former Montgomery Ordinance No. 475. This classification permits single-family residence uses and certain other mostly non-commercial uses. The drive-in thus became a prior non-conforming use upon its annexation.

After 1975, the property was no longer used as a drive-in. The record indicates that in 1975, Columbia Oldsmobile, Inc.

("Columbia") purchased this property. In 1976, the zoning ordinance that was in effect upon annexation was repealed and a new zoning ordinance was adopted, which again zoned the property as "A" residential. In 1982, Columbia began to lease this property to Montgomery for the storage of highway equipment and related materials.

Some time later, Columbia bought an adjacent 5.1-acre parcel that abuts Montgomery Road to the west. That parcel was zoned "E" retail business upon purchase and is squarely situated in Montgomery's commercial corridor that borders Montgomery Road on both sides.

In 1985, Columbia did not renew its lease with Montgomery on the 11.5-acre parcel. At about that time, Columbia also submitted an application to Montgomery to have both the 11.5-acre parcel and the 5.1-acre parcel rezoned to the classification "PD Planned Development."

When that application was denied, Columbia commenced a declaratory judgment action to resolve whether the "A" residential zoning classification was unconstitutional as applied to the 11.5-acre parcel. That action constitutes the subject matter of this case.

At the request of the parties, the trial court specified that "[t]he sole issue to be decided in this case is the constitutionality of the Residence 'A' zoning as applied to the rear 11.5 acres of plaintiff's property." After a trial on the merits, the court made extensive findings of fact and conclusions of law. In its judgment entry, the court found that Columbia had "* * * failed to establish beyond fair debate that * * * [Montgomery's] zoning ordinance as applied to the subject property lacks a rational relationship to the legitimate ends of the police power."

The trial court further found that the subject zoning is consistent with Montgomery's goals of maintaining its residential character and of containing commercial activity, is compatible with surrounding land uses, promotes traffic safety and serves to stabilize the delicate balance between residential land use and limited commercial use. Thus, the court held

that Columbia had failed to sufficiently establish that the ordinance as applied is unreasonable, arbitrary, or confiscatory.

The Court of Appeals for Hamilton County reversed the decision of the trial court on two principal grounds. First, the court found that "the trial court relied on [three] improper considerations in upholding the constitutionality of the zoning ordinance as applied to Columbia's property. * * *" These considerations included Montgomery's lack of "need" for additional businesses, the comprehensiveness of Montgomery's community plan,[1] and the likelihood of an increase in area traffic if the subject property were to be rezoned.

Second, the court of appeals found that Columbia had proved beyond fair debate that it was not economically feasible to develop the subject property for residential purposes under the current zoning ordinance. Thus, the court held that it was against the manifest weight of the evidence for the trial court to uphold the zoning ordinance as it was applied to the subject property.

This cause is before the court upon the allowance of a motion to certify the record.

Keating, Muething & Klekamp, Joseph Trauth, Jr. and *Richard Creighton, Jr., Porter, Wright, Morris & Arthur, Ronald W. Gabriel* and *Robert A. Meyer, Jr.*, for appellee.

Richard B. Dusterberg, director of law, *Schwartz, Manes & Ruby Co., L.P.A., William B. Singer, Calfee, Halter & Griswold, John Gotherman, Mark I. Wallach* and *Joseph A. Castrodale*, for appellant.

Thompson, Hine & Flory, Jack F. Fuchs and *Richard B. Tranter*, urging affirmance for *amicus curiae*, Ohio Home Builders Association.

Judkins & Hayes and *Robert J. Judkins*, urging affirmance

---

[1] The court of appeals also reversed on the basis that the trial court's finding that the traffic on Montgomery Road would be adversely affected by a zoning change was without support in the record.

for *amici curiae*, American Planning Association and Ohio Planning Conference.

Baker & Hostetler, *Michael E. Minister* and *Jane S. Arata*, urging reversal for *amicus curiae*, Ohio Municipal League.

Per Curiam. This case presents the question of whether a trial court must uphold a municipal zoning ordinance when there is competent, credible evidence that the ordinance allows the landowners to retain an economically viable use of their land and that the ordinance substantially advances a legitimate governmental interest in the health, safety or welfare of the community. We answer this question in the affirmative. Thus, we must reverse the judgment of the court of appeals and reinstate the decision of the trial court.

"* * * In order to invalidate a zoning regulation on constitutional grounds, the parties attacking it must demonstrate, beyond fair debate, that the zoning classification denies them the economically viable use of their land without substantially advancing a legitimate interest in the health, safety, or welfare of the community. * * *" *Ketchel* v. *Bainbridge Twp.* (1990), 52 Ohio St. 3d 239, 243, 557 N.E. 2d 779, 783, citing *Karches* v. *Cincinnati* (1988), 38 Ohio St. 3d 12, 19, 526 N.E. 2d 1350, 1357. See *Mayfield-Dorsh, Inc.* v. *South Euclid* (1981), 68 Ohio St. 2d 156, 22 O.O. 3d 388, 429 N.E. 2d 159; *Brown* v. *Cleveland* (1981), 66 Ohio St. 2d 93, 20 O.O. 3d 88, 420 N.E. 2d 103; *Superior Uptown, Inc.* v. *Cleveland* (1974), 39 Ohio St. 2d 36, 68 O.O. 2d 21, 313 N.E. 2d 820; see, also, *Penn Central Transp. Co.* v. *New York City* (1978), 438 U.S. 104; *Goldblatt* v. *Hempstead* (1962), 369 U.S. 590; *Euclid* v. *Ambler Realty Co.* (1926), 272 U.S. 365. Thus, we must employ a two-part analysis to pass on the constitutional validity of a zoning ordinance. We will first determine whether the zoning ordinance allowed the landowner, Columbia Oldsmobile, an economically feasible utilization of its 11.5-acre parcel. We must next determine whether the ordinance permissibly advanced a legitimate interest of the city of Montgomery. *Mayfield-Dorsh, Inc.*, *supra*.

I

We turn first to our discussion of economic feasibility. Ordinarily, a zoning ordinance is not confiscatory so long as the owner is not deprived of the reasonable use of his property. *Valley Auto Lease of Chagrin Falls, Inc.* v. *Auburn Twp. Bd. of Zoning Appeals* (1988), 38 Ohio St. 3d 184, 527 N.E. 2d 825, syllabus. However, a zoning ordinance that deprives an owner of all uses except those which are highly improbable or practically impossible under the circumstances is impermissibly restrictive. *Id.* at 186, 527 N.E. 2d at 827; *Negin* v. *Mentor Bd. of Bldg. & Zoning Appeals* (1982), 69 Ohio St. 2d 492, 23 O.O. 3d 423, 433 N.E. 2d 165; *Superior Uptown, Inc.* v. *Cleveland, supra.*

Among the trial court's findings of fact and conclusions of law is the specific finding that "[p]laintiff can obtain a fair and reasonable profit if the subject property is developed in accordance with existing zoning." Based upon the evidence, the court went on to note that "* * * [a] viable, marketable and profitable single family residence subdivision can be developed on the rear 11.5 acres of the subject property, consistent with its surrounding land uses. A viable, marketable, and profitable 30,000 square foot retail shopping center can be developed on the [5.1-acre] Retail 'E' frontage of the subject property."

The court of appeals reversed these findings, based upon four factors. First, the court believed that Columbia's 11.5-acre parcel is located within the Montgomery Road commercial corridor, a heavily developed and concentrated business area. Second, the court noted that Columbia's adjoining 5.1-acre parcel is already zoned "E" retail. Third, the court averred that the city in 1982 passed an ordinance to allow the planned development of the property directly north of Columbia's property and in 1985 approved a resolution to allow for the commercial use of the property directly across Montgomery Road from Columbia's 5.1-acre parcel. Fourth, the court acknowledged the previous uses of the site as a drive-in theater and storage site for highway equipment. The

court stated that these factors combined to make Columbia's 11.5-acre parcel unsuitable for the residential development required to comply with the parcel's "A" residential zoning classification.

At trial, Jerry Devitt, a professional real estate broker and appraiser and former president and director-treasurer of the Cincinnati Board of Realtors, testified that the 11.5-acre rear parcel is worth $135,000, or approximately $11,700 per acre when undeveloped and zoned as "A" residential. He further stated that the 5.1-acre retail frontage parcel is worth $1,750,000, or approximately $350,000 per acre when undeveloped and zoned "E" retail. Devitt noted that the major portion of the value of commercial properties is found in the frontage. David N. Tipton, a commercial real estate developer, opined that the entire 16.6 acres, if undeveloped and zoned as retail, would be worth $3,154,000, or approximately $190,000 per acre.

However, the majority of the trial court's attention was occupied by testimony concerning the efficacy of profitably developing these two parcels. As Columbia and Montgomery each attempted to address whether it would be feasible to construct a single-family home subdivision on the 11.5-acre parcel, the parties presented conflicting evidence regarding the price that a new single-family home built in such a subdivision might command.

Columbia's witness, West Shell, chairman of a single-family home listing agency, testified that a single-family home built in the new development would command a maximum price of only about $150,000. He based this conclusion in part upon the fact that the most expensive home in Governor's Watch, the adjoining subdivision, sold for $131,000. Shell averred that a $150,000 price per home would reflect a return on investment too low to justify undertaking such an enterprise.

Montgomery's witness, Jerry Devitt, testified regarding new home sales in comparable locations in the Sycamore School District where the subject 11.5-acre parcel is located.

The asking price of those homes ranged from just over $200,000 to nearly $290,000. Additionally, Kenneth R. Campbell, a professional developer of single-family homes, testified that Multiple Listing Service data from the Cincinnati Board of Realtors revealed that the overwhelming majority of new single-family homes with three or more bedrooms in the Sycamore School District listed from $200,000 to $470,000. Columbia's witness, West Shell, acknowledged the general accuracy of these figures and also acknowledged that homes priced at $200,000 through $250,000 would be in the low range of new homes sold in the Sycamore School District.

Campbell and another Montgomery witness, Ronald K. Edgerton, a professional city planner, architect, and consultant, testified regarding a two-phase plan they had developed to place a residential subdivision on the 11.5-acre parcel. The subdivision would consist of eighteen single-family homes on twenty-thousand-square-foot lots and would conform to Montgomery's "A" residential zoning requirements. Campbell stated that each phase of the plan could yield a significant profit.

The first phase or development phase of the plan would consist of subdividing the land into lots, constructing streets and sewers and laying utility lines. Campbell stated that if he could purchase the undeveloped land for the $135,000 price quoted by Jerry Devitt, Campbell's gross profit in selling lots to builders would be $611,100 for the eighteen lots, a profit of approximately sixty-one percent. To receive his minimum twenty-five percent profit, Campbell asserted that he could afford to pay nearly $500,000 for the undeveloped land. He based his testimony that he could market the eighteen lots for an average of $55,000 each upon three sources of information. First, Campbell had developed a subdivision in the middle 1970s on a similarly sized parcel in Montgomery that adjoined offices and condominiums near Montgomery Road. Second, Campbell had consulted home builders with whom he regularly worked in the Sycamore School District. Third, he considered prices paid for similar lots in similar areas.

The second phase or new home construction phase would consist of actually constructing several different models of homes which Campbell, who is also a builder, considered appropriate for this location. Campbell declared that in selling the eighteen new homes in this subdivision, he would expect an average profit per home of approximately $23,000 to $24,000, or approximately $414,000 total profit. Therefore, Campbell posited that given an undeveloped land cost of $135,000, his profit would entail approximately $611,100 for the development phase and approximately $414,000 for the new home construction phase, totalling $1,025,100 profit for fully developing, building upon, and marketing the entire 11.5-acre parcel. Given an undeveloped land cost of $500,000, his profit would entail approximately $250,000 for phase one and approximately $414,000 for phase two, totalling $664,000.

The trial court also had before it various schemes for developing the 5.1 acres for retail usage, as Montgomery desired, or for developing the entire 16.6 acres for retail usage, as Columbia desired. Montgomery witness Stanley Stein, a commercial broker specializing in the construction and development of small retail centers, suggested that a thirty-thousand-square-foot shopping center could be constructed upon the 5.1-acre retail "E" frontage for $3,610,000. When fully leased, the center would have a capitalized value of $4,770,000 and yield a development profit of $1,100,000. David N. Tipton, testifying for Columbia, disputed the viability of Stein's scheme. Tipton asserted that a one-hundred-forty-thousand-square-foot shopping center encompassing all of Columbia's 16.6 acres could be constructed for $12,250,000, would have a fully leased capitalized value of $16,820,000, and would yield a development profit of $4,570,000.

To summarize then, the court was presented with competent, credible evidence that a viable development scheme of the subject property would yield a profit in the range of $664,000 to $1,025,100. See *Seasons Coal Co.* v. *Cleveland* (1984), 10 Ohio St. 3d 77, 10 OBR 408, 461 N.E. 2d 1273;

C.E. Morris Co. v. *Foley Constr. Co.* (1978), 54 Ohio St. 2d 279, 8 O.O. 3d 261, 376 N.E. 2d 578, syllabus. Thus, it is clear that the trial court had sufficient evidence before it to justify its ruling that Montgomery's zoning ordinance did *not*, "beyond fair debate," deny Columbia an economically viable use of its land. *Ketchel* v. *Bainbridge Twp.*, *supra*. Because the court of appeals substituted its judgment for that of the finder of fact, we must reverse the judgment of the court of appeals and reinstate the trial court's judgment on this point.

II

Having determined that the ordinance leaves Columbia with an economically feasible utilization of its land, we turn next to our discussion of whether the zoning ordinance substantially advances Montgomery's legitimate interest in the health, safety, or welfare of the community. *Ketchel* v. *Bainbridge Twp.*, *supra*. A court will uphold a zoning ordinance in the face of a constitutional challenge, unless the party challenging the ordinance can prove "beyond fair debate" that a city's interests in restricting the use of that land were neither legitimate nor substantially advanced by such a restriction. *Id.*

The trial court found that Montgomery had sufficiently demonstrated that the zoning ordinance in question was based on established community standards, objectives, and goals, and was rationally related to the public health, safety and welfare. The following evidence before the court supported this finding. In 1974, the Montgomery City Council adopted a statement of policy regarding planning the city's business district and its environs. Two years later, the council adopted a land use study for the Montgomery Road area prepared by the planning firm of Vogt, Sage & Pflum Consultants. In 1982, the council directed the preparation of a comprehensive community land use plan. The council published the results of a community survey of Montgomery residents the following year. In March 1983, the Montgomery

Planning Commission formulated "Guidelines for the Planning and Management of the Montgomery Road Corridor." In December 1986, the city published the "City of Montgomery Comprehensive Community Plan."

The court of appeals stated that it conducted a complete review of the record and found "* * * that the ordinance setting forth the city's zoning goals and policies, enacted just prior to the filing of Columbia's complaint for declaratory judgment, does not rise to the level of a comprehensive zoning ordinance. The trial court erred in finding the existence of a comprehensive community plan." R.C. 713.06, entitled "Division of municipal corporations into zones," *permits* Ohio municipalities such as Montgomery to "* * * frame and adopt a plan for dividing the municipal corporation or any portion thereof into zones or districts, representing the recommendations of the [municipality's planning] commission, in the interest of the public health, safety, convenience, comfort, prosperity, or general welfare * * *."

R.C. 303.02, regulating rural land use in counties, and R.C. 519.02, regulating land use in townships, *require* that zoning regulations promulgated by counties and townships be in accordance with a comprehensive plan. However, there is no statutory requirement that cities such as Montgomery enact a comprehensive community plan pursuant to its power to zone under R.C. 713.06 *et seq*. The court of appeals erred by implicitly requiring municipalities to enact a comprehensive community plan. Even assuming for the sake of argument that such a requirement existed, there was competent, credible evidence demonstrating Montgomery's extensive planning schemes. Therefore, we reverse the court of appeals' finding on this issue.

The trial court found that Montgomery's twin goals of containing commercial activity to the Montgomery Road commercial corridor and of stabilizing the delicate balance between residential and limited commercial land use were rationally related to classifying Columbia's 11.5-acre parcel as "A" residential. The court also found that Montgomery's zoning scheme was rationally related to continuing "* * * a land

use trend in the City of Montgomery which provided for development of single family residences back from and adjoining the Montgomery Road retail district, with adequate buffering to separate the two uses. * * *" The court of appeals held that "* * * whether the city has a 'need' for a business is not a proper basis for a zoning decision. * * *"

While the court of appeals made a correct statement of the law, it misapplied this pronouncement to the facts of the case and to the trial court's findings of fact and conclusions of law. When the trial court's analysis is read as a whole, it is clear that the trial court's so-called determination regarding Montgomery's "need" for additional businesses was merely an incident of the trial court's attempt to determine the limits of Montgomery's authority to balance the community's needs for residential and commercial development.

Finally, the trial court stated that Montgomery's ordinance promoted traffic safety. The trial court noted that credible evidence had been presented to demonstrate that the addition of a forty-one-thousand-square foot shopping center, utilizing the combined 16.6-acre tract, to the Montgomery Road commercial corridor would add 4,783 new vehicles per day to the subject site, would require the addition of a new traffic signal, would in all probability increase the number of vehicle accidents in the area, and would make the Montgomery Road intersection adjacent to the proposed new shopping center entrance the busiest intersection on Montgomery Road. The court of appeals stated that traffic regulation must remain a by-product and not the principal thrust of zoning legislation. It thus reversed the trial court's holding that Montgomery's efforts to regulate traffic safety were a part of a zoning scheme rationally related to exercising Montgomery's legitimate police powers.

This court has held several times that a "* * * city may lawfully regulate [safety hazards] pursuant to its police powers: protection of pedestrians and drivers, elimination of traffic congestion and reduction of air and noise pollution. * * *" *Brown* v. *Cleveland*, *supra*, at 96, 20 O.O. 3d at 90, 420 N.E. 2d at 106; *Leslie* v. *Toledo* (1981), 66 Ohio St. 2d

488, 491, 20 O.O. 3d 406, 408, 423 N.E. 2d 123, 125; see, generally, *State, ex rel. Associated Land & Investment Corp.*, v. *Lyndhurst* (1958), 168 Ohio St. 289, 7 O.O. 2d 1, 154 N.E. 2d 435; Annotation (1960), 74 A.L.R. 2d 418. While traffic safety considerations may not always be sufficient, in and of themselves, to justify a particular zoning restriction, it is apparent that the trial court merely considered promoting traffic safety as one part of its comprehensive analysis of Montgomery's intricate zoning scheme. Therefore, we reverse the judgment of the court of appeals on this issue and hold that the trial court properly found that Montgomery's zoning ordinance, as applied, substantially advances Montgomery's legitimate interest in the health, safety, and welfare of the community. The decision of the trial court is reinstated in its entirety.

Judgment reversed.

MOYER, C.J., HOLMES, WRIGHT and RESNICK, JJ., concur.

H. BROWN, J., concurs separately.

SWEENEY, J., dissents.

DOUGLAS, J., not participating.

H. BROWN, J., concurring. I write separately because I disagree with some of the majority's reasoning, though not its conclusion, on the issue of whether Montgomery's zoning ordinance follows a comprehensive community land use plan.

While the statutory language which governs municipal zoning (R.C. 713.06) is slightly different from that governing zoning regulation by counties and townships (R.C. 303.02 and 519.02, respectively), I think the majority makes too much of the difference. It is clear from a reading of R.C. Chapter 713 as a whole that the General Assembly intended municipalities, like townships and counties, to zone in accordance with a comprehensive plan.

In order to satisfy this requirement, however, a municipality need not contract for a formal land-use study by professional urban planners, as some of the *amici* have suggested. There need not even be a separate document, labelled "plan," which is used as a guide to drafting the ordinance. *Central Motors Corp.* v. *Pepper Pike* (1979), 63 Ohio App. 2d 34, 65, 13 O.O. 3d 347, 367, 409 N.E. 2d 258, 280; see, also, *Bell* v. *Elkhorn* (1985), 122 Wis. 2d 558, 566-567, 364 N.W. 2d 144, 148. The municipality need only show that its zoning ordinance implements a coherent land use policy derived from a rational consideration of the needs of the community as a whole. See, generally, Mandelker, Land Use Law (2 Ed. 1988) 82-84, Sections 3.14-3.15. As many courts (including our own) have recognized, a well-drafted zoning ordinance can, by itself, constitute the "comprehensive plan." *Garcia* v. *Siffrin Residential Assn.* (1980), 63 Ohio St. 2d 259, 273-274, 17 O.O. 3d 167, 175-176, 407 N.E. 2d 1369, 1379; *Central Motors*, *supra*; *Rumpke Waste, Inc.* v. *Henderson* (S.D. Ohio 1984), 591 F. Supp. 521; *Furtney* v. *Simsbury Zoning Comm.* (1970), 159 Conn. 585, 271 A. 2d 319; *Dawson Enterprises, Inc.* v. *Blaine Cty.* (1977), 98 Idaho 506, 567 P. 2d 1257; *Cleaver* v. *Bd. of Adjustment of Tredyffrin Twp.* (1964), 414 Pa. 367, 200 A. 2d 408; Mandelker, *supra*, at 82, Section 3.14.

As the majority correctly notes, there is sufficient competent, credible evidence in the record to support a finding that Montgomery has enacted zoning legislation in accordance with a comprehensive plan, and the court below erred in holding otherwise.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NO. C-870741
TRIAL NO. A-8604419

COLUMBIA OLDSMOBILE, INC.,

Plaintiff-Appellant,

vs.

CITY OF MONTGOMERY, OHIO,

Defendant-Appellee.

DECISION

(Filed May 10, 1989.)

Civil Appeal from: Court of Common Pleas
Judgment Appealed from is: Reversed and Cause Remanded
Date of Judgment Entry on Appeal: May 10, 1989

Keating, Muething & Klekamp, Joseph L. Trauth, Jr., Esq., and Richard L. Creighton, Jr., Esq., 1800 Provident Tower, One East Fourth Street, Cincinnati, Ohio 45202, for Plaintiff-Appellant,

Santen, Shaffer & Hughes and William B. Singer, Esq., 105 East Fourth Street, Suite 1800, Cincinnati, Ohio 45202, for Defendant-Appellee.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Hamilton County Common Pleas Court, the transcript of the proceedings and the stipulation relative to page 1073, the briefs and the argument of counsel.

Columbia Oldsmobile, Inc. (Columbia), the applicant, is the owner of a tract of unimproved real estate near the southeast corner of Montgomery and Perin Roads in the City of Montgomery (city), the appellee. The real estate is divided into two zoning classifications in the ordinances of the city: the western 5.1 acres abutting, in part, the east line of Montgomery Road is zoned "Retail E" and the remainder of the tract consisting of 11.5 acres is zoned "Residence A." The eastern limit of the 11.5-acre tract is also the boundary line between the city and the Village of Indian Hill to the east.[1]

Columbia submitted an application to the city to have its property rezoned from "Retail E" and "Residence A" to "Planned Development PD". The application was denied and Columbia then filed this action seeking a declaratory judgment that the "Residence A" zoning is unconsitutional as applied to its property. The case was tried without the intervention of a jury. On the request of the parties that the court specify the issues triable in the within action for declaratory judgment, the court by entry dated September 24, 1987, ruled that "[t]he sole issue to be decided at trial is the constitutionality of the present zoning of the property in question." The court further ruled that a finding of constitutionality would be a final order but a finding of unconstitutionality would require further proceedings under the guidance set forth in *Union Oil Co.* v. *Worthington* (1980), 62 Ohio St. 2d 263, 405 N.E.2d 277.

---

[1] The configuration of the subject tract of real estate may be likened to a "T" placed on its side so that the vertical portion of the "T" extends eastwardly from Montgomery Road (with a frontage of Montgomery Road of approximately 700 feet) and then widens to form the crossbar by extending northwardly and southwardly approximately 330 feet and 250 feet, respectively. The north and south lines then extend further eastwardly to the corporation line and close along the corporation line with a length of approximately 865 feet. The vertical portion of the "T" and a narrow strip of the cross bar on the west constitute the 5.1 acres zones "Retail E." The amended complaint inadvertently reverses the east-west geographic references to the real estate in question but the legal descriptions clearly fix the property east of Montgomery Road and south of Perin Road.

In the judgment entry, the trial court stated that the "sole issue to be decided in this case is the constitutionality of the Residence "A" zoning as applied to the rear 11.5 acres of plaintiff's property." The ordinance was declared to be constitutional as applied to the subject property.

Columbia brings four assignments of error in its appeal.[2]

The appellant's first assignment of error is that the court erred in using "the wrong standard for determining the constitutionality of the Montgomery zoning ordinance as applied to Columbia's property." Specifically, appellant asserts that the trial court erred in upholding the zoning ordinance by finding that it is "rationally related" to the public health, safety, morals or general welfare rather than using the correct standard to determine whether it is "substantially related" to those police-power concerns.

The attention of this court is directed to page 3 of the judgment entry and pages 7 and 8 of the findings of fact and conclusions of law to demonstrate this assignment. The judgment entry contains statements to the effect that a property owner attacking the presumption of validity of a zoning ordinance has the "burden of establishing beyond fair debate that the zoning ordinance bears no rational relationship to the protection of the health, safety and welfare of the community," and that Columbia had failed to show the absence of that "rational relationship to the legitimate ends of the police power." Also, on page 3 of the judgment entry, the court states that the existing zoning as applied to the subject property is consistent with the community goals and objectives and "is rationally related to the health, safety and welfare of the community."

---

[2] The notice of appeal specifies the judgment entry of October 19, 1987, as the order being appealed. Findings of fact and conclusions of law were not filed until December 17, 1987. Neither side has raised a question of the timeliness of the appeal or the jurisdiction of the court to make the findings and conclusions *sua sponte* after the final judgment. We do not address those matters because, if they do constitute error, they have not been preserved. But, see, *Walker* v. *Doup* (1988), 36 Ohio St. 3d 229, 522 N.E.2d 1072.

The findings of fact and conclusions of law contain similar language as, for example, in Conclusion of Law H:

> Plaintiff has failed to sustain its burden of proving that the existing zoning is unreasonable, arbitrary, and confiscatory beyond fair debate, and bears no rational relationship to the health, safety and welfare of the citizens of Montgomery.

Thus, appellant's first assignment of error raises the issue of the interchangeability of the terms "substantially related" and "rationally related."

Frequently in the development of case law, a phrase acquires a secondary meaning so specific that when a different phrase is used, a question is immediately raised whether a different meaning is intended. In the criminal law the legislature has provided a statutory definition of the phrase "beyond a reasonable doubt."[3] That phrase has also been used in cases involving the constitutionality of zoning regulations. The party alleging unconstitutionality of a municipal ordinance must establish that condition "beyong a reasonable doubt." *Hilton* v. *Toledo* (1980), 62 Ohio St. 2d 394, 405 N.E.2d 1047. In order to rebut the presumption of constitutionality of an enactment of the General Assembly, the constitutional infirmity must be shown "beyond a reasonable doubt." *State* v. *Renalist, Inc.* (1978), 56 Ohio St. 2d 276, 383 N.E.2d 892; *State, ex rel. Dickman*, v. *Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59, paragraph one of the syllabus.

However, in 1981, the Supreme Court of Ohio ruled that in an action for declaratory judgment challenging the constitutionality of a zoning classification, the unconstitutionality must be demonstrated "beyond fair debate." *Mayfield-Dorsh, Inc.* v. *South Euclid* (1981), 68 Ohio St. 2d 156, 429 N.E.2d 159.

Finally, the Supreme Court, observing that it had charac-

---

[3] R.C. 2901.05(D).

terized the burden of proof in zoning cases as "beyond a reasonable doubt" (*Hilton* v. *Toledo*, *supra*) and "beyond fair debate" (*Mayfield-Dorsh*, *Inc.* v. *South Euclid*, *supra*), stated that it could "discern little difference in meaning between the two characterizations." *Karches* v. *Cincinnati* (1988), 38 Ohio St. 3d 12, 19, 526 N.E.2d 1350, 1357, footnote 7. We conclude that our analysis of the synonymy of "rationally related" to the police power and "substantially related" to it should be guided by conceptual consideration rather than by application of secondary meanings of customary phrases.

The concept of "reason" seems to be common to the definition of "rational" but the latter is the "more technical or abstract term, concerned always with pure reason," whereas "reasonable is the more pragmatic idea of simple common sense."[4] The common concepts given by dictionaries as synonyms of "substantial" are "material, essential, or important."

Under the facts of this case and in consideration of the language used by the trial jurist in his findings of fact and conclusions of law and the judgment entry, we conclude there is no significant difference in the terms "rational relationship" and "substantial relationship" and that the trial court did not err as alleged in the first assignment of error.

There is another reason why the assignment is not well made. The parties in their opening statements and throughout the proceedings used the terms interchangeably.[5] The appellant having used the terms interchangeably may not now complain that the trial court did likewise.

The second assignment of error asserts that the trial court relied upon improper considerations in upholding the con-

---

[4] The Random House Dictionary, unabridged (1981) 1197. Cf. Webster's Third New International Dictionary (1981) 1885, and Black's Law Dictionary (4 Ed. Rev. 1968) 1431.

[5] See T.p. (Vol. 1) 12, 25, 35, 84; T.p. (Vol. 2) 319, 423; T.p. (Vol. 3) 528, 608, 612; T.p. (Vol. 4) 757; T.p. (Vol. 5) 1148; T.p. (Vol. 6) 1177, 1193, 1208. The foregoing is by way of example and not comprehensive.

stitutionality of the zoning ordinance as applied to the subject property. Specifically, Columbia contends that the improper considerations involved determinations that the community did not need more business establishments; that the zone change would create more traffic; that the refusal to rezone was not arbitrary;[6] that the zoning ordinance was based on a comprehensive plan; and that the zoning of Columbia's property was not fatally flawed even though the property was automatically placed in the residence district when it was annexed.

The findings of fact as made by the trial court include findings that might be interpreted as a determination that the city had no "need" for further business development and that to rezone the subject real estate would entail an increase in traffic in the area. See Findings of Fact, 7, 8 and 9. The question of whether the city has a "need" for a business is not a proper basis for a zoning decision. *Atomotive Supmarkets, Inc.* v. *City of Willoughby* (1986), 27 Ohio App. 3d 238, 500 N.E.2d 927. "* * * [T]raffic regulation must remain a by product of zoning activities, and the primary product must always be to insure the greatest enjoyment of one's land, taking into account the rights of others and the needs of the community * * *" *State, ex rel. The Killeen Realty,* v. *City of East Cleveland* (1959), 169 Ohio St. 375, 160 N.E.2d 1.

Columbia also argues that the trial court erred when it found that the zoning ordinance pertaining to Columbia's property was based upon a comprehensive plan. There is evidence in the record that, rather than formally adopting a comprehensive community plan, the city adopted a document in 1976 setting forth certain goals and policies.

In *Greenhills Home Owners Corp.* v. *Village of Greenhills* (1966), 5 Ohio St. 2d 207, 215 N.E.2d 403, certiorari denied (1966), 385 U.S. 836, 87 S. Ct. 82, the court stated in the second syllabus paragraph:

A 'comprehensive zoning ordinance' is one which ef-

---

[6] See our disposition of Columbia's third assignment of error.

> fectively provides for that variety and quantity of land uses deemed necessary to the orderly development of the entire territory of the legislative authority enacting it.

More specifically, the court described the ordinance under consideration as follows:

> In addition to the Greenbelt district, the ordinance divided the entire village into four other districts, three involving residential uses and one for commercial purposes. It regulates the density of uses within the districts, the height of structures, watt usage, and so on. In short, it is a comprehensive zoning ordinance in that it provides for that variety of land uses deemed necessary to the preservation of that portion of the village plan already executed and to the orderly completion of that plan.

We find that the ordinance setting forth the city's zoning goals and policies, enacted just prior to the filing of Columbia's complaint for declaratory judgment, does not rise to the level of a comprehensive zoning ordinance. The trial court erred in finding the existence of a comprehensive community plan.

Columbia also alleges under the second assignment of error that the trial court should have granted a directed verdict in its favor because its property was automatically zoned as residential upon annexation. The trial court found that the property was automatically zoned residential upon annexation of the tract in 1967. The record reveals that the zoning ordinance that was in effect upon annexation was repealed and, in 1976, a new zoning ordinance was adopted, which zoned Columbia's property as "A" residential. Therefore, the zoning classification which was applied upon annexation is immaterial.

We find that the trial court relied on improper considerations in upholding the constitutionality of the zoning ordi-

nance as applied to Columbia's property. The second assignment of error is overruled to the extent it pertains to the zoning classification applied upon annexation. In all other respects, the assignment is sustained.

Columbia's third assignment of error alleges that the trial court's upholding of the constitutionality of the existing zoning, as applied to the real estate *sub judice*, is against the manifest weight of the evidence. We agree.

In order for Columbia to prevail on this assignment the record must demonstrate that the zoning restriction, as applied by the city to Columbia's land, is unreasonable, arbitrary and confiscatory beyond fair debate. See *Kroger Company* v. *Bd. of County Commissioners* (Jan. 23, 1985), Hamilton App. No. C-840095, unreported, wherein the court observed:

> The validity of a zoning ordinance is fairly debatable if reasonable minds may differ. A mere difference of opinion is not sufficient to make the issue of validity of a zoning ordinance fairly debatable because it is relatively easy for a property owner and a municipality to obtain the services of expert witnesses who will have differing opinions as to the validity of a zoning ordinance. The fairly debatable rule must concern itself not with mere words of expressions of opinion, but basic physical facts pertaining to the issue of the validity of the zoning ordinance.

Following a complete review of the record, a majority of this court finds that Columbia met its burden, proving beyond fair debate that it is not economically feasible to develop the subject property for residential purposes, under the current zoning ordinance.

In *State, ex rel. Euverard*, v. *Miller* (1954), 98 Ohio App. 283, 129 N.E.2d 209, the relator sought a writ of mandamus from this Court to compel the respondent zoning inspector to issue a permit for the construction of a service station. The parties stipulated that the real estate "* * * was located at a

heavily traveled intersection in the midst of commercial establishments, has little suitability for residence purposes, but is very suitable for business purposes." This Court stated:

> Taking into account the character of this location and the uses of the real estate adjacent, immediately and diagonally across therefrom, and the natural development thereof, this court has no difficulty in finding that relator's real estate, situated as it is on the heavily traveled thoroughfares, has little suitability for residential use, but rather is a prime business site, so that the zoning thereof as residence "A" has no tendency to promote the public health, safety, morals, convenience, or general welfare, and there is no reasonable relation thereto.

In *State, ex rel. Rosenthal*, v. *City of Bedford* (1956), 134 N.E.2d 727, 74 Ohio Law Abs. 425, the Court of Appeals for Cuyahoga County followed *State* v. *Miller, supra*, in concluding that a writ of mandamus should issue to compel the city to issue a building permit for the erection of a service station. The property in question was located on a busily traveled intersection. Prior acquisitions for highway and utility purposes had virtually destroyed the possibility that the property could be used for residential purposes. Further, two corners of the intersection had service stations operating as conforming uses. The court noted:

> Zoning is the application of the police power of the state or municipal corporation in the classification of the use of real property for the protection of the health, safety, morals, and general welfare of the people. It cannot be permitted to completely destroy the value of the property of a citizen and at the same time provide no useful benefit to the people in the neighborhood to which it has application. Nor can a zoning ordinance be used to control competition. Either there must be public benefit derived from the exercise of the power or a restriction of the use of real

> property through a zoning ordinance is confiscatory and therefore unconstitutional. Zoning should also, as near as reasonably possible, deal equally with the property or as to property similarly situated.
>
> * * *

In the instant cause, the record reveals that Columbia's property is located within the Montgomery commercial corridor.[7] A myriad of retail establishments are immediately adjacent to the parcel. From approximately 1945 to 1975 the property was used as a drive-in theater. After purchasing the property, Columbia leased it to the city for the storage of highway equipment and related materials. This arrangement ceased in 1985, at Columbia's insistence, because the city failed to maintain the property in a neat and orderly manner. Additionally, the adjoining 5.1 acres. which fronts on Montgomery Road, is zoned for retail use. We note that in 1982 the city passed an ordinance to allow the planned development of the property directly north of Columbia's parcel. In 1985 the city approved a resolution to allow for the commercial use of the property directly across Montgomery Road from Columbia's property.

Land developer Kenneth R. Campbell, one of the city's expert witnesses, acknowledged that the location of Columbia's property within the Montgomery commercial corridor is a negative factor in regard to residential development. Nonetheless, he expresed the opinion that if the property was developed as single-family residences, each home could command an average selling price of $235,000 and yield a before-tax profit of approximately $24,000. T.p. 1098.

Columbia's expert, West Shell, testified that residential development of Columbia's property is not economically feasible. He stated that if single-family homes were constructed on this property they would only command a price of $150,000. Shell stated that certain factors concerning Colum-

---

[7] The Montgomery commercial corridor extends along Montgomery Road from Cross County Highway northward to Schoolhouse Lane.

bia's land were taken into consideration in reaching his opinion:

> First, there's a very deep drop there of some twelve to sixteen feet. You have the flat eleven and the half acres (*sic*) [the subject property]. You have a very narrow road, Perin Road, that comes back here that's fourteen feet, that's not up to standards.
>
> You have a T-K Nursery with a gate where they take out your heavy peat moss, ground cover, whatever it might be.
>
> This is all commercial here [indicating]. This corner you have a — used to be a furniture store. It's now Coldwell Banker's office, you have a Steak N Shake here.
>
> It's just not a very good approach for residential development. It's isolated. It's surround (*sic*) by commercial retail.
>
> And if you try to cut into this street here [indicating] you'd have a very sharp incline and you have a very steep cut.
>
> When you come off of Perin Road you're right across from T-K Gardens which is a very commercial operation.

Our review of the record convinces us that the trial court's finding that the existing zoning was constitutionally applied to the subject property is against the manifest weight of the evidence. The third assignment of error is sustained.

In Columbia's fourth and final assignment of error it is alleged that the trial court's finding that the traffic on Montgomery Road would be adversely affected by a zone change is without support in the record. The assignment of error is sustained for the reasons set forth under the second assignment of error.

In conclusion, we hold that Columbia overcame the presumption of the validity of the city's zoning classification, demonstrating beyond fair debate that the zoning classification is unreasonable, arbitrary and confiscatory as applied to Columbia's real estate, and that the classification bears no substantial relationship to the public health, safety and morals or general welfare. We find the "A" residential zoning classification is unconstitutionally applied to Columbia's property. Accordingly, the judgment of the court of common pleas is reversed and this cause is remanded to that court for further proceedings consistent with this Decision and law.

HILDEBRANDT, P.J. and DOAN, J., CONCUR.
KLUSMEIER, J., DISSENTS.

KLUSMEIER, J., DISSENTING.

I respectfully note my dissent from the decision of the majority in its disposition of the second, third and fourth assignments of error. I dissent because as I view the record in the case, the trial court did not err in weighing the evidence and in applying the appropriate standard of review.

The judgment of the trial court should be affirmed.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A-8604419

COLUMBIA OLDSMOBILE, INC.,

Plaintiff,

vs.

CITY OF MONTGOMERY, OHIO,

Defendants.

JUDGMENT ENTRY

This cause was tried to the Court on plaintiff's claim that defendant's zoning ordinance, which limits land owned by the plaintiff to residential development, is unreasonable, arbitrary, confiscatory and, therefore, unconstitutional as applied to said land.

This Court finds that plaintiff owns 16.6 acres of land at the southeast corner of Montgomery and Perin Roads in the City of Montgomery, Ohio, the defendant herein. A 5.1 acres portion of this land fronting on Montgomery Road is zoned "E" Retail, and fanning out eastwarly, the rear 11.5 acres is zoned "A" Residential. Plaintiff desiring to build a shopping center on this property, unsuccessfully pursued a zone change to "PD" Planned Development for the entire 16.6 acres tract.

Plaintiff purchased this property in two parcels. The 11.5 acres portion was purchased on November 3, 1975 and the 5.1 acres portion was purchased on July 13, 1978. The back 11.5 acres portion had been annexed by the City in 1967 and automatically zoned "A" Residential by action of a City ordinance which automatically zoned land annexed by the City as "A" Residential. At the time this land was annexed it was

being used as a drive in theater which continued to operate until 1975.

Plaintiff claims that beyond fair debate the City's zoning ordinance is unreasonable, arbitrary and confiscatory as applied to the 11.5 parcel and that its proposed commercial use of the entire tract, whether under "E" or "PD" zoning, is the only reasonable use for the property.

The 11.5 acres rear parcel of the subject property is surrounded on three sides by areas which are zoned residential. To the south is Governor's Watch, a subdivision of single family residences zoned "A" Residential. Immediately to the north of the subject property, across Perin Road, the land is zoned Residence "A" by the City of Montgomery and is subject to a pre-zoning non-conforming use for storage by the TK Nursery; and an approved condominium project known as Perin Walk, which has not been developed. The eastern boundary of the City of Montgomery marks the eastern boundary of the subject property. To the east of this boundary is the Village of Indian Hill and land which is zoned for single family residence.

The sole issue to be decided in this case is the constitutionality of the Residence "A" zoning as applied to the rear 11.5 acres of plaintiff's property.

Municipalities have the authority under their police powers to enact zoning ordinances which are presumed valid until the contrary is clearly shown by the party challenging the zoning. In order to overcome the presumption of validity, the land owner has the burden of establishing beyond fair debate that the zoning ordinance bears no rational relationship to the protection of the health, safety and welfare of the community. In this case the Court finds that the plaintiff has failed to establish beyond fair debate that defendant's zoning ordinance as applied to the subject property lacks a rational relationship to the legitimate ends of the police power.

The City of Montgomery, through its council, has established community goals and objectives which include maintaining the residential character of the City and the contain-

ment of commercial activity. The existing zoning as applied to the subject property is consistent with these goals and objectives and is rationally related to the health, safety and welfare of the community. The Court finds that this zoning is compatible with the surrounding land uses, promotes traffic safety and serves to stabilize the delicate balance between residential land use and limited commercial land use established by the City. Plaintiff can obtain a fair and reasonable profit if the subject property is developed in accordance with existing zoning. It is the determination of this Court that plaintiff has failed to establish beyond reasonable debate that defendant's zoning ordinance as applied to the subject property is unreasonable, arbitrary or confiscatory.

The constitutionality of the existing zoning of the subject property is hereby upheld and therefore must stand without interference by this Court.

/s/ JACK SHERMAN, JR.,
JUDGE

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A-8604419

COLUMBIA OLDSMOBILE, INC.,

Plaintiff,

vs.

CITY OF MONTGOMERY, OHIO,

Defendants.

COURT'S FINDING OF FACT AND CONCLUSIONS OF LAW

The Court, after hearing five (5) days of testimony, has reached the following finding of fact and conclusion of law:

FINDINGS OF FACT

1. Plaintiff owns 16.7 acres of land at the southeast corner of Montgomery and Perin Roads in the City of Montgomery, Ohio, the defendant herein. A 5.1 acres portion of this land fronting on Montgomery Road is zoned "E" Retail, and fanning our eastwardly, the rear 11.5 acres is zoned "A" Residential. Plaintiff, desiring to build a shopping center on this property, unsuccessfully pursued a zone change to "PD" Planned Development for the entire 16.6 acres tract.

2. Plaintiff purchased this property in two parcels. The 11.5 acres portion was purchased on November 3, 1975 and the 5.1 acres portion was purchased on July 13, 1978. The back 11.5 acres portion had been annexed by the City in 1967 and automatically zoned "A" Residential by action of a City ordinance which automatically zoned land annexed by the City as "A" Residential. At the time this land was annexed it

was being used as a drive in theater which continued to operate as a non-conforming use until 1975.

3. The 11.5 acres rear parcel of the subject property is surrounded on three sides by areas which are zoned residential. To the south is Governor's Watch, a subdivision of single family residences zoned "A" Residential. Immediately to the north of the subject property, across Perin Road, the land is zoned Residence "A" by the City of Montgomery and is subject to a pre-zoning nonconforming use for storage by the TK Nursery; and an approved condominium project known as Perin Walk, which has not been developed. The atmosphere and character of Perin Road is that of a quiet country lane. The eastern boundary of the City of Montgomery marks the eastern boundary of the subject property. To the east of this boundary is the Village of Indian Hill and land which is zoned for single family residence.

4. The City of Montgomery, through its Council has established community standards with respect to land use within the City, which require maintenance of the residential character of the City of Montgomery, and containment of its commercial corridor within the existing retail zone. These standards have found expression in at least the following documents: Defendant's Exhibit 13, Council Resolution #27-1974; defendant's Exhibit 11, Community Survey, 1983; defendant's Exhibit 12, Montgomery Comprehensive Community Plan, Statement of Goals and Policies (1986).

5. Maintenance of the existing Residence "A" zoning on the rear 11.5 acres of the subject property, and refusal to expand the Retail "E" district to include the entire subject property, is consistent with these community standards.

6. The rear portion of the subject property was zoned Residence "A" in the same manner as the property developed as the Governor's Watch subdivision immediately to the south was zoned, upon annexation to the City of Montgomery in 1967. Development of the Governor's Watch subdivision was consistent with and in cnformity to this Residence "A" zoning, and continued a land use trend in the City of Montgomery which provided for development of single family

residences back from and adjoining the Montgomery Road retail district, with adequate buffering to separate the two uses. This trend was exemplified by the Planned Development of the Montgomery Square Shopping Center and its adjoining single family residence subdivision.

7. In a land use study prepard by the firm of Vogt, Sage and Pflum in 1976 for the City of Montgomery, defendant's Exhibit 73, it was noted that the City of Montgomery had 103 acres of land zoned Retail "E", which was enough retail space for a self contained city of 40,000 people. At the present time, Montgomery has a population of about 12,000 people. Montgomery thus already bears a substantial burden of retail development oriented to the needs of the metropolitan area, as opposed to its local community needs.

8. If the rear 11.5 acres of the subject property is not maintained in a Residence "A" classification, but is rezoned for full retail use, then the properties zoned Residence "A" on the north side of Perin Road will inevitably lose their residential character, and eventually be rezoned for commercial use. This will have a "domino effect," which will place additional pressure for expansion of the Montgomery Road commercial corridor beyond that consistent with community goals.

9. Montgomery Road is a heavily travelled road, generating between 18,000 and 19,000 cars per day at the subject site. Full retail development of the subject property will result in the attraction of 4,783 new vehicles per day to the subject site, or an increase of 36% over the current traffic volume. Development in accordance with the existing zoning, however, will result in an increase of only 1,924 vehicles per day, or an increase of only 12% over the current volume. Therefore, developing the subject property to full retail use will generate three times as much traffic as developing the property as zoned.

10. Developing the subject property to full retail use will require erection of a new traffic signal at the main entrance to the proposed development; development in accordance with existing zoning will not require erection of a traffic

signal, since it will not generate sufficient traffic to warrant a signal.

11. Statistics indicate there are more accidents along Montgomery Road at signalized intersections than at non-signalized intersections.

12. Full retail development of the subject property would result in over 10,000 vehicles per day using the main entrance and exit intersection of the proposed development with Montgomery Road. This would be higher than the volume that currently exists on any other cross street intersection along Montgomery Road in Montgomery.

13. There would be a substantial increase in the volume of peak hour traffic entering and exiting the subject property both at the main entrance of the proposed shopping center, and at Perin Road, which would result in one of the busiest intersections in the City of Montgomery, and would cause traffic problems.

14. The plaintiff's proposed use is unreasonable for the subject site in view of the community's goals not only with respect to its effect upon traffic, but also with respect to its effect upon the surrounding residential properties. A large, intense, confined shopping center is the most intense commercial use which could be made of the subject property.

15. The existing zoning of the subject property is consistent with good planning and zoning practices, and is rationally related to and benefits the health, safety and welfare of the Montgomery community, for the foregoing reasons which may be summarized as follows:

A. The existing zoning is consistent with Montgomery's community goals and standards.

B. The existing zoning is compatible with surrounding land uses.

C. The existing zoning provides a reasonable restraint upon development of the commercial districts.

D. The existing zoning prevents Montgomery from having to bear a disproportionate burden of the regional commercial development.

E. The existing zoning confines Montgomery Road traffic growth within reasonable limits.

F. The existing zoning prevents development of another substantial, accident prone intersection along Montgomery Road.

G. The existing zoning completes the trend for residential development adjacent to and surrounding the Montgomery Road commercial corridor, and preserves and advances the residential character of the City of Montgomery.

H. The existing zoning prevents the domino effect with respect to the northern part of the central business district corridor which is substantially certain to result if the subject property is rezoned to a full commercial use.

16. Plaintiff can obtain a fair and reasonable profit if the subject property is developed in accordance with the existing zoning. A viable, marketable and profitable single family residence subdivision can be developed on the rear 11.5 acres of the subject property, consistent with its surrounding land uses. A viable, marketable, and profitable 30,000 square foot retail shopping center can be developed on the Retail "E" frontage of the subject property.

17. The Sycamore School district, in which the City of Montgomery is located, is one of the most attractive suburban school districts to potential buyers of new homes in the Cincinnati area.

18. In the Sycamore School district, and in the City of Montgomery, new homes constructed adjacent to adverse uses such as commercial and office developments, and expressways, command prices in the range of $200,000 and up. The same is true with respect to new homes constructed in relatively small subdivisions adjoining older established neighborhoods with substantially lesser home values.

19. The rear 11.5 acres of the subject property can be developed as an attractive and marketable 18 lot subdivision with substantial buffering from retail uses along the Montgomery Road frontage.

CONCLUSIONS OF LAW

A. Municipalities have the authority under their police powers to enact zoning ordinances which are presumed valid until the contrary is clearly shown by the party challenging the zoning.

B. In order to overcome the presumption of validity, the land owner has the burden of establishing beyond fair debate that the zoning ordinance bears no rational relationship to the protection of the health, safety and welfare of the community.

C. The validity of a zoning ordinance is fairly debatable if reasonable minds may differ.

D. A court may not substitute its judgment for that of the legislative body in determining whether or not the zoning regulations applied to a particular property advance the health, safety, morals and general welfare of the community. All that the Court is required to find in order to sustain existing zoning is that the zoning bear some reasonable relationship to those objects of the police power.

E. Interference with the property owner's personal plans and desires relative to his property is insufficient to invalidate a zoning ordinance. The fact that property is more valuable for an excluded use does not in itself void a zoning restriction. Consistently with these principles, a zoning ordinance may classify property for residential purposes although it can more profitably or benefically be used for commercial purposes.

H. Plaintiff has failed to sustain its burden of proving that the existing zoning is unreasonable, arbitrary, and confiscatory beyond fair debate, and bears no rational relationship to the health, safety and welfare of the citizens and of Montgomery.

I. The consitutional validity of the existing zoning of the subject property is fairly debatable, and therefore the legislative judgment of the Montgomery City Council must be allowed to stand without interference by this Court.

/s/ JACK SHERMAN, JR.

THE SUPREME COURT OF OHIO
1991 TERM

To wit: January 16, 1991

Case No. 89-1132

Columbia Oldsmobile, Inc.,

Appellee,

v.

City of Montgomery, Ohio,

Appellant.

REHEARING ENTRY
(Hamilton County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. C870741)

/s/ THOMAS J. MOYER
Chief Justice

(2)

Case No. 90-1673

Supreme Court, U.S.
FILED
JUN 3 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

COLUMBIA OLDSMOBILE, INC.,

Petitioner,

v.

CITY OF MONTGOMERY, OHIO,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

Of Counsel:
JOHN C. NORWINE
City of Montgomery,
Law Director
8050 Hosbrook, Suite 200
Cincinnati, OH 45236
(513) 891-1530

MARK I. WALLACH
Counsel of Record
JOHN E. GOTHERMAN
SMITH R. BRITTINGHAM IV
CALFEE, HALTER & GRISWOLD
1800 Society Building
Cleveland, OH 44114-2688
(216) 622-8200

Attorneys for Respondent
The City of Montgomery

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE CASE 1

ARGUMENT 3

I. THE QUESTION PRESENTED FOR REVIEW DOES NOT ARISE FROM THE FACTS OF THIS CASE 3

II. THE QUESTION PRESENTED FOR REVIEW DOES NOT ARISE FROM THE ACTUAL LAWSUIT FILED AND PURSUED BY COLUMBIA ... 7

III. THE QUESTION PRESENTED INVOLVES ONLY ISSUES OF MUNICIPAL POWER UNDER STATE LAW, AND DOES NOT IMPLICATE FEDERAL CONSTITUTIONAL RIGHTS 9

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Baker v. City of Milwaukie, 271 Ore. 500, 533 P.2d 772 (1975) 6, 7, 11, 12

Cathcart-Maltby-Clearview Community Council v. Snohomish County, 96 Wash. 2d 201, 212, 634 P.2d 853, 860 (1981) (en banc) 12

Chrinko v. South Brunswick Township Planning Board, 77 N.J. Super. 594, 187 A.2d 221 (N.J. Super. Ct. Law Div. 1963) 13

Hoffman v. Brevard County Board of Commissioners, 390 So. 2d 445, 446 (Fla. Dist. Ct. App. 1980) 12

Montgomery v. Bremer County Board of Supervisors, 299 N.W.2d 687 (Iowa 1980) 12

O'Loane v. O'Rourke, 231 Cal. App. 2d 774, 42 Cal. Rptr. 283 (Cal. Dist. Ct. App. 1965) 7

State, by Rochester Association of Neighborhoods v. City of Rochester, 268 N.W.2d 885, 890 (Minn. 1978) (en banc) 12

State, ex rel. City of Mansfield, v. Lowrey, 3 Ohio Misc. 174, 177, 210 N.E.2d 751 (Richland Com. Pleas Ct. 1964) 5

Stones v. Plattsmouth Airport Authority, 193 Neb. 552, 228 N.W.2d 129 (1975) 13

Todrin v. Board of Supervisors of Charlestown Township, 27 Pa. Commw. 583, 367 A.2d 332 (Pa. Commw. Ct. 1976) 13

Wuebker v. Hopkins, 29 Ohio App. 386, 388, 163 N.E. 566 (Ohio Ct. App. 1928) 5

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

5 McQuillin, *Municipal Corporations*, § 15.02 at 55 (3d ed. 1991) 5

8 McQuillin, *Municipal Corporations*, § 25.78 at 287 (3d ed. 1991) 13

Annot., 40 A.L.R.3d 372 § 3 (1971) 13

Ohio Constitution, Article XVIII, Section 3 .....1, 9

CONSTITUTIONAL PROVISIONS

Ohio Constitution, Article XVIII, Section 3 provides as follows:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

STATEMENT OF THE CASE

Petitioner, Columbia Oldsmobile, Inc. ("Columbia"), has set forth an adequate description of the procedural posture of this case which requires only minor elaboration. Columbia's claim throughout this lawsuit has been, until very recently, that "defendant's [Montgomery's] zoning ordinance, which limits land owned by the plaintiff to residential development, is unreasonable, arbitrary, confiscatory and, therefore, unconstitutional as applied to said land." Judgment Entry, Court of Common Pleas, Hamilton County, Ohio, Case No. A-8604419, reprinted in the Appendix to Columbia's Petition for Writ of Certiorari (hereinafter referred to as "Appendix"), at 26a. In fact, the Common Pleas Court noted that "[t]he sole issue to be decided in this case is the constitutionality of the Residence "A" zoning as applied to the rear 11.5 acres of plaintiff's property." Appendix at 27a. As Columbia correctly notes, the Common Pleas Court entered judgment in favor of Montgomery, stating that "[Columbia] has failed to sustain its burden of proving that the existing zoning is unreasonable, arbitrary, and confiscatory beyond fair debate, and bears no rational relationship to

the health, safety and welfare of the citizens and of Montgomery." Appendix at 34a.

The Court of Appeals for the First Appellate District of Ohio considered the same issue, that is, the constitutionality of the zoning ordinance as applied to Columbia's property. The Court of Appeals came to the opposite conclusion, finding that "the 'A' residential zoning classification is unconstitutionally applied to Columbia's property." Decision, Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio, Appeal No. C-870741, reprinted in the Appendix at 25a.

Finally, on appeal to the Ohio Supreme Court, the same issue was again addressed:

> This case presents the question of whether a trial court must uphold a municipal zoning ordinance when there is competent, credible evidence that the ordinance allows the landowners to retain an economically viable use of their land and that the ordinance substantially advances a legitimate governmental interest in the health, safety or welfare of the community. We answer this question in the affirmative.

Columbia Oldsmobile, Inc. v. Montgomery, 56 Ohio St. 3d 60, 62, 564 N.E.2d 455, 457 (1990), reprinted in the Appendix at 4a. The Ohio Supreme Court found that the ordinance did indeed allow Columbia an economically feasible use of its property and that Montgomery's comprehensive zoning ordinance, as applied to Columbia's property, substantially advanced Montgomery's legitimate interest in the health, safety, and welfare of the community. Appendix at 12a. That finding has not been appealed by Columbia.

As Columbia admits in its Petition for Writ of Certiorari to the Supreme Court of Ohio, the so-called "federal constitutional issue" now claimed to justify this Court's attention – that Montgomery purportedly failed to follow its own resolution allegedly requiring zoning decisions to be made pursuant to a comprehensive plan – was not raised by Columbia until it filed its Motion for Rehearing with the Ohio Supreme Court, which motion was denied. Petition for Writ of Certiorari to the Supreme Court of Ohio (hereinafter "Petition") at 2. In fact, the resolution now at issue played no part in the decisions of the three state courts which have previously considered this case; the Supreme Court of Ohio mentioned its existence briefly, *see* Appendix at 9a, while the Court of Appeals and the Court of Common Pleas apparently considered the resolution to be so irrelevant as not even to warrant acknowledgement.

ARGUMENT

I. THE QUESTION PRESENTED FOR REVIEW DOES NOT ARISE FROM THE FACTS OF THIS CASE.

Perhaps the most compelling reason that this Court should choose not to review the decision of the Supreme Court of Ohio is that the question Columbia would have this Court decide simply does not arise from the facts of this case. Columbia proposes the following question for this Court's review:

> Whether a municipal corporation *that adopts a policy that zoning decisions be made in accordance with a comprehensive plan* but does not utilize a comprehensive plan in denying a landowner's

> application for a zone change violates the Fifth and Fourteenth Amendments to the United States Constitution.

Petition at 7 (emphasis added). As the factual basis for this question, Columbia points to language in Resolution No. 35-1982, passed by the Montgomery City Council on August 4, 1982. Columbia claims that this Resolution constituted a "commitment to enact and follow" a comprehensive zoning plan. Petition at 12. However, a cursory review of the Resolution quickly refutes that claim. The Resolution "directs the City Manager to undertake *the preparation* of a Comprehensive Community Plan for the City of Montgomery that will identify the City's major needs and desirable improvements." (Emphasis added). The Resolution also specifies that the City Manager should work closely with the Planning Commission, and that the Commission "shall make the final submission to the City Council on or before the first Council Meeting in April 1983." Finally, the Resolution permits the City Manager to "expand upon the directions afforded in this Resolution according to his judgment and discretion."

The clear and unambiguous language of the Resolution merely directs the City Manager to *prepare* a Comprehensive Community Plan for later possible consideration by the Council. Nothing in the Resolution obligates the Council to *adopt* a Comprehensive Community Plan, or to make all zoning decisions pursuant to a Comprehensive Community Plan. In addition, the Resolution requires the City Manager and the Planning Commission to "make the final submission to the City Council," presumably so that

City Council can review the Plan to determine whether or not to adopt it. It is clear that the Resolution is merely the first step in City Council's overall consideration of the appropriateness of a comprehensive community plan.[1]

Throughout the Petition, Columbia exaggerates the effect of the Resolution and its relevance to Columbia's cause of action. Columbia claims that:

> once the City of Montgomery obligated itself to base future zoning decisions upon such a master plan, Montgomery was obligated, by its own ordinance, to do so. The City made a compact with its citizens which it did not keep.

Petition at 8. Montgomery merely passed a resolution, not an ordinance as Columbia states. Under Ohio law, a resolution is generally the proper procedure for informal enactments providing for the disposition of a particular item of business. Ordinances are usually reserved for the enactment of a regulation of a general or permanent nature. *Wuebker v. Hopkins*, 29 Ohio App. 386, 388, 163 N.E. 566 (Ohio Ct. App. 1928); *State, ex rel. City of Mansfield, v. Lowrey*, 3 Ohio Misc. 174, 177, 210 N.E.2d 751 (Richland Com. Pleas Ct. 1964). *See also* 5 McQuillin, *Municipal Corporations*, § 15.02 at 55 (3d ed. 1991):

> [I]t may be observed that a resolution deals with matters of a special or temporary character; an ordinance prescribes some permanent rule of conduct or government, to continue in force

---

[1] As Columbia is forced to admit, the Ohio Supreme Court held that "there is no statutory requirement [in Ohio] that cities such as Montgomery enact a comprehensive community plan pursuant to its power to zone. . . . " Appendix at 10a.

> until the ordinance is repealed. An ordinance is distinctively a legislative act; a resolution, generally speaking, is simply an expression of opinion or mind or policy concerning some particular item of business coming within the legislative body's official cognizance, ordinarily ministerial in character and relating to the administrative business of the municipality.

(Citations omitted). While the name given to a particular City Council directive is not necessarily dispositive, the fact that City Council chose to enact a resolution rather than an ordinance reflects City Council's apparent belief that the directive in the Resolution was temporary and administrative in nature. The Montgomery City Council's action in directing the City Manager to prepare a comprehensive plan and submit it to the City Council for consideration is hardly a legislative act giving rise to a permanent rule of conduct or government. Rather it is a ministerial act relating to the administrative business of the municipality. Columbia's claim that the Resolution gives rise to a "compact with its citizens which [Montgomery] did not keep" is an overstatement of the nature of a resolution in general, and a significant misrepresentation of the specific Resolution at hand.

Because the facts of this case are not as Columbia represents, the case law cited by Columbia is irrelevant. In *Baker v. City of Milwaukie*, 271 Ore. 500, 533 P.2d 772 (1975), the Oregon Supreme Court was considering, as noted by Columbia, "the effect of the *adoption*, by a municipality, of a comprehensive plan on preexisting and conflicting zoning ordinances." Petition at 9, quoting

Baker v. City of Milwaukie (emphasis added). Since Montgomery has not *adopted* a comprehensive plan, the question of what effect the adoption of such a plan would have on Montgomery's preexisting zoning ordinances is not properly presented by Columbia's current appeal. Likewise, in *O'Loane v. O'Rourke*, 231 Cal. App. 2d 774, 42 Cal. Rptr. 283 (Cal. Dist. Ct. App. 1965), the court was considering whether the *adoption* of a comprehensive plan by a City Council should be subject to a referendum even though effectuated t rough a resolution. The court's positive response is again irrelevant since Montgomery has not *adopted* a comprehensive plan through any mechanism.

Columbia's entire brief rests on the assumption that Montgomery has actually obligated itself to zone in accordance with a comprehensive zoning plan. That assumption is incorrect. This Court should not accept this case for review because the facts of the case do not give rise to the legal issue Columbia proposes for the consideration of this Court.

II. THE QUESTION PRESENTED FOR REVIEW DOES NOT ARISE FROM THE ACTUAL LAWSUIT FILED AND PURSUED BY COLUMBIA.

The question presented for review by Columbia is unrelated either to the lawsuit which Columbia originally brought or to the issues which were presented to the lower state courts. As noted in the Statement of the Case, above, Columbia brought a declaratory judgment action to determine the constitutionality of the Montgomery zoning ordinance which limited the use of Columbia's

property to residential development. Columbia argued before each of the state courts that the zoning ordinance denied Columbia the economically feasible use of its property without furthering a legitimate interest in the health, safety and welfare of the community. The trial court and the Ohio Supreme Court found otherwise, and upheld the constitutionality of the Montgomery comprehensive zoning ordinance.

Throughout the state court proceedings the issue of the lack of a comprehensive plan arose tangentially as part of the inquiry into the relationship between the zoning classification and Montgomery's legitimate interest in the health, safety and welfare of the community. However, the supposed nexus between the absence of a comprehensive plan and Resolution 35-1982 played no role at all in the lower court decisions. One can scour the assorted state court opinions and find only one reference to Resolution 35-1982 – the Ohio Supreme Court listed the Resolution as one factor which indicated that the zoning "was based on established community standards, objectives, and goals, and was rationally related to the public health, safety and welfare." Appendix at 9a. Columbia itself did not raise the issue it now champions until its Motion for Rehearing before the Ohio Supreme Court, which motion was denied. The issue of whether Montgomery's City Council followed a resolution passed in 1982 directing a city official to prepare a comprehensive plan so that the Council might consider its adoption simply has no relationship to the inquiry presented to the courts below by Columbia's lawsuit: whether the current Montgomery zoning, originally applied to Columbia's property in 1967, was constitutional.

III. THE QUESTION PRESENTED INVOLVES ONLY ISSUES OF MUNICIPAL POWER UNDER STATE LAW, AND DOES NOT IMPLICATE FEDERAL CONSTITUTIONAL RIGHTS.

Even if Columbia's articulation of the facts underlying the question presented were accurate – that Montgomery obligated itself to adopt a comprehensive plan – and even if the question presented belonged in this lawsuit, it would not require this Court's review since it raises only state law issues. Columbia's question presented arguably raises the issues of whether Resolution 35-1982 expired in April 1983 when the City Manager and the Planning Commission did not make final submission of the plan to City Council, and whether City Council was permitted to overrule the effect of Resolution 35-1982 implicitly. Columbia's argument also attempts to raise the issue of whether a municipality is required to zone in accordance with an adopted comprehensive plan. However, each of these issues can and should be resolved by reference to Ohio law; no federal constitutional rights are implicated by Montgomery's action or, in this case, inaction.

As a general matter, Montgomery's municipal powers are defined by Ohio law. Ohio municipalities have the "authority to exercise all powers of local self-government. . . . " Ohio Constitution, Article XVIII, Section 3. Under Article XVIII, Section 3, a municipality may propose and adopt a charter and exercise all powers of local self-government pursuant to that charter. Montgomery has enacted a charter, and that charter includes provisions setting forth the municipality's legislative and administrative powers and the initiative, referendum and

recall powers reserved to the people of Montgomery. The overall scope of Montgomery's municipal power and the specific effect of Resolution 35-1982 is dictated by the Montgomery charter and the Ohio Constitution. In particular, the answer to the question of whether the Resolution retains any lingering effect after the City Manager and the Planning Commission failed to prepare and submit a comprehensive plan to the City Council within the time specified by the Resolution is controlled by state law concepts, not federal constitutional law.

Ohio common law is also the determining factor in deciding whether the City Council is permitted to ignore its prior directive to the City Manager to prepare a comprehensive plan. Generally, Ohio law permits Ohio municipalities to reconsider their actions until a final determination is made. While the Montgomery City Council did indeed pass Resolution 35-1982, it subsequently made zoning decisions, prepared and considered a community survey, and formulated guidelines for development in the Montgomery Road Corridor, apparently without waiting for the comprehensive plan to be prepared. Appendix at 9a-10a. These actions suggest that the City Council implicitly reconsidered its prior decision to consider the adoption of a comprehensive zoning plan.[2] Ohio law determines whether such a reconsideration was permissible.

---

[2] As a practical matter, the Montgomery City Council may well have determined that a comprehensive plan was unnecessary given the comprehensive nature of Montgomery's zoning ordinance. The Ohio Supreme Court noted that "there was

(Continued on following page)

Finally, Ohio law dictates whether Montgomery would be required to zone in accordance with a comprehensive zoning plan if it were to adopt such a plan. The Ohio Supreme Court has explicitly stated that no requirement exists which compels an Ohio municipality such as Montgomery to adopt a comprehensive plan. Appendix at 10a. The fact that Ohio litigants apparently have not raised the question of what effect the adoption of a comprehensive plan would have on a municipality's zoning decisions supports the generally accepted view that plans are advisory only and are not regulatory. Plans often constitute mere recommendations or projections of administrative staff or consultants, but do not impose regulations. Columbia relies in part on *Baker v. City of Milwaukie, supra,* to support its claim that Montgomery would be required to make all zoning decisions in conformity with the comprehensive zoning plan which Montgomery supposedly obligated itself to adopt. In *Baker v. City of Milwaukie,* the Oregon Supreme Court, after examining the legislative history of the applicable Oregon statutes, ruled that once a comprehensive plan had been adopted by a municipality, the municipality

---

(Continued from previous page)

competent, credible evidence demonstrating Montgomery's extensive planning schemes." Appendix at 10a. In his concurring opinion, Ohio Supreme Court Justice Herbert Brown stated that "a well-drafted zoning ordinance can, by itself, constitute the 'comprehensive plan.' " Appendix at 13a (citations omitted). Justice Brown would have held that "Montgomery has enacted zoning legislation in accordance with a comprehensive plan. . . . " Appendix at 13a. Thus, the City Council may have decided that a comprehensive plan would have been needlessly cumulative.

must conform its preexisting zoning ordinances to the plan.[3]

Other state courts have come to different conclusions, however, holding that, even after the adoption of some sort of comprehensive land use plan, zoning decisions need not be made in strict conformity with that plan. For example, in *Montgomery v. Bremer County Board of Supervisors*, 299 N.W.2d 687 (Iowa 1980), the Supreme Court of Iowa upheld a rezoning decision, which by statute was required to be made in accordance with a comprehensive plan, even though it did not comply with the current comprehensive plan. Several state courts have held that comprehensive plans are merely advisory and need not be followed strictly. *See, e.g., Cathcart-Maltby-Clearview Community Council v. Snohomish County*, 96 Wash. 2d 201, 212, 634 P.2d 853, 860 (1981) (en banc) ("Nonconformance with a comprehensive plan does not necessarily render the [rezoning] action illegal. The plan is only a general blueprint and thus only general conformance is necessary." (citations omitted)); *Hoffman v. Brevard County Board of Commissioners*, 390 So. 2d 445, 446 (Fla. Dist. Ct. App. 1980) ("However, the plan, being merely a set of guidelines, does not rigidly bind the Board of County Commissioners in zoning decisions."); *State, by Rochester Association of Neighborhoods v. City of Rochester*, 268

---

[3] Columbia's position is actually a significant extension of the decision in *Baker v. City of Milwaukie*. While the court in *Baker v. City of Milwaukie* held that a municipality must conform preexisting zoning ordinances to a subsequently adopted comprehensive plan, Columbia essentially argues that once the decision to *prepare* a plan has been made, the preexisting zoning ordinances are invalid even before the plan has been formulated and adopted.

N.W.2d 885, 890 (Minn. 1978) (en banc) ("The statute in fact does not require even that the zoning ordinance conform exactly to the city's land-use plan."); *Todrin v. Board of Supervisors of Charlestown Township*, 27 Pa. Commw. 583, 367 A.2d 332 (Pa. Commw. Ct. 1976); *Stones v. Plattsmouth Airport Authority*, 193 Neb. 552, 228 N.W.2d 129 (1975); *Chrinko v. South Brunswick Township Planning Board*, 77 N.J. Super. 594, 187 A.2d 221 (N.J. Super. Ct. Law Div. 1963); *see generally* 8 McQuillin, *Municipal Corporations*, § 25.78 at 287 (3d ed. 1991).

As a general matter, there is considerable debate over what is a "comprehensive plan." *See, e.g.*, Annot., 40 A.L.R.3d 372 § 3 (1971), and cases cited therein. Plans are often thought of as voluminous advisory studies, usually of a technical nature, prepared by professional planners to be used as a reference in preparing more detailed ordinances. In contrast, as stated earlier, one Justice of the Ohio Supreme Court would have held that Montgomery's comprehensive zoning ordinance itself constituted a "comprehensive plan." Appendix at 13a. The exact nature of a comprehensive plan, and the general effect of a municipality's adoption of such a plan, depends on the peculiar zoning policy of each state. Accordingly, whether Montgomery would be required to zone in strict conformance with any comprehensive plan it might adopt is an issue of Ohio law with which this Court need not concern itself.

CONCLUSION

Columbia brought this action in an attempt to have Montgomery's Residential A zoning classification held unconstitutional as applied to Columbia's property. After

travelling through the state courts of Ohio, Columbia's efforts eventually failed, and the Ohio Supreme Court upheld the constitutionality of Montgomery's comprehensive zoning ordinance. Apparently realizing that its primary argument had failed to win the day, Columbia attempted to manufacture a federal constitutional issue in order to gain this Court's attention. Unfortunately, Columbia has built its castle on a bed of sand. Neither the facts of this case nor the previous legal arguments raised by Columbia and considered by the lower courts give rise to the allegedly unique federal issue Columbia proposes for review by this Court. Resolution of the question presented by Columbia merely requires an analysis of state law issues.

Because Columbia's appeal does not raise issues requiring this Court's review, the Petition for Writ of Certiorari to the Supreme Court of Ohio should be denied.

Respectfully submitted,

MARK I. WALLACH
Counsel of Record
JOHN E. GOTHERMAN
SMITH R. BRITTINGHAM IV
CALFEE, HALTER & GRISWOLD
1800 Society Building
Cleveland, OH 44114-2688
(216) 622-8200

Attorneys for Respondent,
The City of Montgomery

Of Counsel:

JOHN C. NORWINE
City Of Montgomery, Director of Law
8050 Hosbrook, Suite 200
Cincinnati, OH 45236
(513) 891-1530